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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1864

TINO FIUMARA, MICHAEL COPOLLA, JERRY COPOLLA and LARRY RICCI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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IN THE

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No.

TINO FIUMARA, MICHAEL COPOLLA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioners, Tino Fiumara, Michael Copolla, Jerry Copolla and Larry Ricci respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 21, 1980.

OPINION BELOW

No opinion was rendered by the Court of Appeals nor by the District Court for the District of New Jersey.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 21, 1980. (App. A, *infra*,

pp. (1a-3a). A timely petition for rehearing or rehearing *en banc* was denied on April 23, 1980 (App. B, *infra*, pp. 4a-5a), and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether due process permits the consideration for sentencing purposes of allegations of criminal activity not evidenced by an arrest, an indictment or a conviction and, if so, whether the procedural framework provided by the Dangerous Special Offenders Act, 18 U.S.C. §3575 *et seq.* or, alternatively, that provided by *United States v. Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd and remanded*, 579 F.2d 707 (2d Cir.), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir.), *cert. denied*, 440 U.S. 910 (1979) is required.

2. Whether a trial jury may ever be properly permitted to use transcripts of tape recordings independently of the actual playing of the tapes themselves.

3. Whether the doctrine of completeness precludes discrete treatment of transcripts of a witness' three appearances before the grand jury when the result is to admit into evidence in written form a capsule of the government's case-in-chief and to bar admission of the witness' later modification and explanation of his earlier testimony.

CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the Constitution of the United States provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On October 31, 1978, petitioners Tino Fiumara ("Fiumara"), Michael Copolla, Jerry Copolla and Larry Ricci ("Ricci") were indicted by a federal grand jury sitting in Newark, New Jersey, on charges of extortion (Count I) and conspiracy to commit extortion (Count II) in violation of the Hobbs Act, 18 U.S.C. §1951 (App., 5087a-5097a).[1] Each petitioner entered a plea of not guilty to the charges.

Trial commenced on June 4, 1979 in the United States District Court for the District of New Jersey (Honorable Herbert J. Stern, United States District Judge, presiding). Testimony demonstrated that, in 1977, a New Jersey restaurant owner named Louis Crescenzi was approached by a former employee, Michael Simonini, who made a claim for back wages and other gratuities. When Crescenzi refused to settle these claims, Simonini threatened Crescenzi with physical and economic harm (App. 1642-1644, 1648-1651).

Crescenzi then requested the aid of petitioner Jerry Copolla, a friend and patron of his restaurant. Through the intervention of Copolla, who was assisted by the other petitioners, the dispute was settled without Crescenzi having to pay anything to Simonini (App. 1658, 1661, 1708-1709).

When Crescenzi was informed of the settlement, he voluntarily offered to pay for the petitioners' services (App. 1726-1728). Thereafter, Jerry Copolla proposed a repay-

1. "App." refers to the appendix in the Court of Appeals.

ment figure of 25 percent of Crescenzi's restaurant business. Crescenzi rejected this figure and, as the result of subsequent negotiations, he agreed to place Jerry Copolla on his restaurant payroll as a "no-show" employee at a salary of $300.00 per week (App. 2005, 1789-1799).

The government's theory of the case was that the petitioners had demanded the 25 percent from Crescenzi, eventually obtaining $300.00 per week, under a threat of violence. The petitioners contended that the money was paid by Crescenzi voluntarily in payment of a recognized obligation. At trial, Crescenzi unequivocally denied that petitioners ever put him in fear of harm to himself, members of his family or his business, and stated that he had paid petitioners voluntarily (App. 1735, 1985, 1992, 2008).

To refute Crescenzi's trial testimony that he had not been put in fear, the government sought successfully to introduce into evidence the transcript of the first of three grand jury appearances by Crescenzi. The petitioners then sought to introduce into evidence the transcripts of Crescenzi's two later appearances, in which he recanted his earlier testimony that he had been put in fear by the petitioners, stated that he had not been allowed to testify fully during his first appearance and stated that government prosecutors had "suggested" certain answers to him (App. 1988, 1991, 2655-2657).

The court refused to permit either of the two later transcripts to be admitted into evidence as a physical exhibit, even though the effect of the ruling was to permit the jury to have in written form a capsule of the government's case-in-chief while refusing to permit the jurors to look at the written form of Crescenzi's recantation (App. 2658-2661).

Additional evidence in the case came in the form of tape recordings of crucial conversations between a government informant and the supposed victim, Crescenzi. The tape recordings were transcribed and, during the trial, the jurors were properly permitted to use the transcripts to assist them as they listened to the tapes themselves. When deliberations began, however, the jurors were allowed to take the transcripts alone—without the tapes—into the jury room.

Petitioners vigorously objected and asked, at a minimum, for a limiting instruction to the effect that the transcripts were to be used only if the tapes themselves were being played (App. 2917-2918). The court declined to give such an instruction and, instead, specifically instructed the jurors that they could use the transcripts "to the extent they help you in refreshing your own recollections as to the conversations" and "as an aid to you in deliberating" (App. 2946-2947).

On June 20, 1979, the jury returned a verdict of guilty on each count of the indictment as to each of the petitioners (App. 3034-3037). Following the verdict the government, by letter dated July 10, 1979 (App. C, *infra*, pp. 6a-11a), requested that the United States Probation Department incorporate into the petitioners' presentence reports certain allegations of other criminal activity for which the petitioners had never even been arrested. The Probation Department complied with the government's request.

As a result of such compliance, the presentence report prepared as to petitioner Fiumara contains allegations that he murdered three men in 1967 by shooting them to death, another in 1969 by beating him to death, and that he wounded others in 1973 and 1976 by gunfire or beatings.

Fiumara was never arrested, never indicted and never tried for any of these alleged crimes.

The presentence report, as a result of such incorporation, further asserted that Fiumara was a "made" member of the Genovese organized crime "family" and that each of the other petitioners consorted with Fiumara and/or with other organized crime figures.

The petitioners challenged the veracity of the allegations and asked the court either to disregard such unproven charges altogether since they were not evidenced by a conviction or, alternatively, to hold a full evidentiary hearing such as was conducted in the Eastern District of New York in the case of *United States v. Fatico*, 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd and remanded*, 579 F.2d 707 (2d Cir.), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir.), *cert. denied*, 440 U.S. 910 (1979).

The court declined to disregard the allegations and, instead, held an 11-day evidentiary hearing which generated a transcript of more than 1,750 pages (App. 3102a-4861a). Testimony from 17 government witnesses sought to link the petitioners to organized crime and, in the case of petitioner Fiumara, to several unsolved murders in the Northern New Jersey area. Virtually all of the testimony was hearsay, and much of the hearsay was second- or third-hand information from unnamed informants.

At the conclusion of the hearing, the judge expressly declined to make any specific findings of fact with respect to the government's allegations beyond the statement that "[e]verything the Court learned about these defendants [during the trial] . . . was confirmed by the sentencing hearing" (App. 4834a-4835a). The allegations were permitted to remain in the presentence reports.

Fiumara was sentenced to concurrent maximum terms of 20 years imprisonment on each of the counts and fined $10,000.00. Michael Copolla was sentenced to concurrent terms of 10 years on each of the counts and was fined $5,000.00. Jerry Copolla was sentenced to seven years and fined $5,000.00, and Ricci was sentenced to three years and fined $5,000.00 (App. 4841a-4843a).

REASONS FOR GRANTING THE WRIT

Point I

The sentencing procedure raises crucial due process issues which should be resolved by this Court.

The question of the procedural safeguards which should be employed when allegations of criminal activity not evidenced by a conviction are made for sentencing purposes is one which urgently requires consideration and resolution by this Court.

The consequences of the inclusion of such charges in presentence reports are considerable, yet the Circuit Courts of Appeals are in disarray as to the procedure to follow when such charges are made and as to the standards by which the allegations should be tested.

The procedure followed in this case conflicts with the procedure which is followed in the Fourth Circuit and has been urged by the District of Columbia Circuit. It also conflicts with the procedure approved recently by the Second Circuit. Further, it seems to conflict at least in principle with prior decisions of this Court and with Congressional policy. Because of the importance of this issue and the frequency with which similar questions arise in the federal courts, the issuance of the writ here sought is amply justified.

A. *The decision below conflicts with decisions of other Circuit Courts of Appeals*

At least three different approaches to the problem presented by allegations of criminal activity not evidenced by a conviction have been followed by the Circuit Courts of Appeals, and the decision below in this case conflicts at least to some degree with each of those three approaches.

One approach has been adopted by the Fourth Circuit in *Baker v. United States,* 388 F.2d 931, 934 (4th Cir.

1968): "No conviction or criminal charge should be included in the [presentence] report, or considered by the court, unless referable to an official record." This prophylactic rule has been urged by the American Bar Association in its *Standards Relating to Criminal Justice,* Probation 37 (Approved Draft, 1970). In 1978, the District of Columbia Circuit strongly urged both the Probation Department and the United States Attorney's Office in that Circuit to consider the *Baker*-A.B.A. rule when preparing or submitting information for inclusion in presentence reports. *United States v. Strother,* 578 F.2d 397, 405-06 n.8 (D.C. Cir. 1978).

A second approach was inaugurated by Judge Weinstein of the Eastern District of New York and subsequently approved by the Second Circuit in *United States v. Fatico,* 441 F. Supp. 1285 (E.D.N.Y. 1977), *rev'd and remanded,* 579 F.2d 707 (2d Cir.), *on remand,* 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd,* 603 F.2d 1053 (2d Cir.), *cert. denied,* 440 U.S. 910 (1979). There, the trial court held a full evidentiary hearing into charges by the government, tested the charges by a standard of "clear, unequivocal and convincing evidence" and rendered explicit findings of fact which could be, and in fact were, reviewed by the Court of Appeals.

The third approach is that of the Ninth Circuit as shown in *United States v. Weston,* 448 F.2d 626, 633-34 (9th Cir. 1971), *cert. denied,* 404 U.S. 1061 (1972), in which the court approved the consideration of such allegations only when the government could produce information which would persuade the trial court of the validity of its charges. Although the standard of proof was not expressly set forth, it would appear to be a "preponderance of the evidence" standard. Again, implicit in the *Weston* opinion was the concept that findings of

fact would be made by the trial court which could be reviewed on appeal.

It is clear that the procedure followed in the instant case directly conflicts with the *Baker* rule of the Fourth Circuit and the *Strother* advisory of the District of Columbia Circuit. It also conflicts with the procedure followed in *Fatico* in that no express findings of fact were made by the trial court and there was no indication by the trial court that it had tested any of the allegations against any standard of proof whatsoever.

An implicit conflict with *Weston* arises from the fact that even allegations which were withdrawn or were unsupported by evidence received during the hearing remained in the petitioners' presentence reports. A charge that petitioner Fiumara had wounded a union official by shooting at him was withdrawn by the government from the court's consideration, yet remains in Fiumara's report. Testimony from federal and state experts on organized crime strongly disputed the allegation that petitioner Jerry Copolla had major ties to organized crime, yet the charge remains in his report.[2]

Thus, it would seem that the procedure in this case conflicts with the *Weston* requirement that the government produce, at a minimum, some information which could persuade the trial court of the validity of the government's charges.[3]

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2. This result contrasts with the court's statement at the outset of the hearing that one of the purposes of such a proceeding was to permit the court "to dismiss allegations which are not proven" (App. 3170a).

3. Much of the evidence received during the hearing consisted of testimony by law enforcement officials as to statements they had received at second- or third-hand from unproduced and unnamed informants—precisely the kind of evidence the *Weston* court regarded as inherently unreliable (*See, e.g.*, App. 3340a-3404a).

B. *The decision below conflicts in principle with prior decisions of this Court*

This Court's opinion in *Townsend v. Burke*, 334 U.S. 736 (1948), recognized a due process right to be sentenced only on the basis of information which is accurate. A trial court faced with allegations of crimes not evidenced by a conviction, to give meaning to this due process right, must make a factual determination that such allegations are or are not accurate in order to consider or reject them in the sentencing process.

In this case, however, the sentencing judge expressly declined to make such a factual determination with respect to the government's charges of other crimes. In doing so, it effectively insulated its sentencing proceeding from meaningful appellate review while placing its *imprimatur* on the charges by its off-handed comment that: "[e]verything the Court learned about these defendants [during the trial] . . . was confirmed by the sentencing hearing."

Such action cannot be reconciled with the mandate of *Townsend*. Due process requires more than merely going through the motions of a hearing, particularly when the liberty of an individual is being seriously jeopardized because of what was, in effect, a crime or crimes altogether separate and apart from that for which he was tried and convicted. In this sense, due process should require "findings adequate to make meaningful any appeal that is allowed." *Specht v. Patterson*, 386 U.S. 605, 610 (1967).[4]

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4. Petitioners concede that *Williams v. New York*, 337 U.S. 241 (1949), would appear to permit the court to consider hearsay in sentencing proceedings and that the case has been interpreted by some courts as allowing consideration of any charges of crimes

C. *The decision below conflicts in principle with congressional policy*

Twice in the last several years, Congress has spoken vigorously with respect to the procedural safeguards it believes are essential in contexts similar or identical to that implicated here. Firstly, in its 1975 Amendments to the Federal Rules of Criminal Procedure, Congress expressly provided a defendant facing sentencing with the right to see and to contest the contents of his presentence report. Fed. R. Crim. P. 32(c)(3)(A).

In explaining why it felt that such an opportunity at least to comment on the contents of the presentence report should be available, the House Judiciary Committee stated:

> [S]ince the consequences of any significant inaccuracy [in a presentence report] can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect.

House Report 94-247, 94th Cong., 1st Sess. (1975), *reprinted in* [1975] U.S. Code Cong. & Admin. News 674.

Although Congress did not mandate the holding of a full hearing, it did give the trial courts discretion to permit the defendant to produce testimony or other information bearing on the accuracy of the report.

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not evidenced by a conviction. *E.g., United States v. Weston, supra,* 448 F.2d at 631. However, petitioners submit that *Williams* has been limited by *Townsend* and *Specht* and deserves further reconsideration in light of *United States v. Tucker,* 404 U.S. 443 (1972), *Gardner v. Florida,* 430 U.S. 349 (1977) and *Lockett v. Ohio,* 438 U.S. 586 (1978).

Further, in adopting the Dangerous Special Offenders Act, 18 U.S.C. §3575 *et seq.* (set forth in full at App. D. *infra*, pp. 11a-19a), Congress set forth its view of the procedural safeguards which should attach before a defendant could face an augmented or enhanced sentence because of his involvement in other crimes than that for which he had been tried and convicted. Among those safeguards were advance specific notice of the basis for the government's intent to seek special offender status, a full hearing including the right to cross-examine the government's witnesses, a "preponderance of the evidence" standard of proof, express findings of fact and appellate review of the findings and reasons of the sentencing court.[5]

It is clear that, by these two pronouncements of policy, Congress intended that proper and serious consideration be given to the due process rights of defendants in the sentencing phase of a criminal proceeding. It follows, as a matter of elementary logic, that Congress did not intend that a defendant lose all of those carefully-structured safeguards simply because the government chose the simple expedient of submitting its charges of other crimes to the Probation Department rather than to the court. Yet that, in effect, is precisely what the government has been allowed to do here.

Obviously, had the government sought the 25-year maximum sentence under the Dangerous Special Offenders Act, it would have had to comply with all of the

5. It is true that the Act permits the court to consider hearsay. *See* 18 U.S.C. §3577 (App. D, *infra*, p. 17a). This does not, however, resolve the question of whether hearsay may be considered *only* in the procedural context of the Act, nor the question of the constitutionality of such consideration of hearsay from a due process standpoint in the wake of recent decisions of this Court. *See* note 4, *supra*.

procedural requirements of that Act. It would have had to file notice, before trial, of its intent to seek enhancement of the petitioners' sentences based on information extraneous to the crime for which they were tried. It would have had to prove its allegations by a preponderance of the evidence standard. It would have had to accept express findings of fact by the trial court as to the validity of those charges, and it would have had to face the risk that an appellate court would find that the trial court's conclusions were clearly erroneous as a factual matter.

Here, on the other hand, the government was permitted to wait until the entire trial was completed and then simply submit its allegations of other crimes to the Probation Department for inclusion in the presentence reports. Although it did have to produce witnesses to support its charges, its allegations were not expressly tested—by the trial court or on appeal—by any standard whatsoever. It was even allowed to maintain in the presentence reports charges which were not supported by any evidence whatsoever. Finally, it was enabled to significantly enhance the sentences of these petitioners solely on the basis of allegations of crimes for which petitioners were never even arrested, much less indicted or tried.[6] In short, the government was able to circumvent all of the procedural safeguards Congress so thought-

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6. Although the trial court insisted that it was not sentencing the petitioners for their alleged involvement in other crimes (*e.g.*, App. 4829a), it indicated its view that a sentencing judge could pronounce sentence based on "his assessment of the individuals who stand before him, who he finds them to be, what he finds them to be, his assessment of their future, his assessment of what they may do to society and his assessment based on all of that of what society should do to them" (App. 4831a). Clearly, the grossly disparate sentences imposed even among the four petitioners demonstrates the degree to which the court's judgment was affected by the charges of murder and "mafia" membership.

fully constructed. The conflict in principle with Congressional policy could not be clearer.

D. *The importance of the due process claims raised requires resolution of these issues by this Court*

The due process dangers inherent in this type of procedure are amply demonstrated by the instant case. Although two of the petitioners faced an imminent trial in the nearby Southern District of New York on racketeering charges, the prosecutors were allowed to regale the New York and New Jersey press with their views of the internal workings of the "mafia" in the area and petitioners' alleged connections to organized crime. This circumvented the protections against arbitrary public accusations of criminal conduct afforded by the grand jury system. It also jeopardized the petitioners' right to a fair trial in New York and led them to seek the closing of the hearing. *See United States v. Fiumara*, 605 F.2d 116 (3d Cir. 1979). Further, it negates the protections against improper joinder afforded by Fed. R. Crim. P. 14, as evidenced by the fact that Fiumara, for example, was forced to attempt to defend himself against 11 separate and unrelated charges ranging from multiple murder to racketeering. Finally, Fiumara was forced to attempt to respond to charges for which there is no statute of limitations, raising serious fifth amendment concerns.

Additionally, the consequences of the procedure followed in this case for these petitioners are staggering: every aspect of their incarceration and ultimate release will be negatively affected by the actions of the court in this case.

Under 28 C.F.R. §§2.18 and 2.19, the contents of petitioners' presentence reports will affect their eligibility for parole. Under Parole Board and Corrections Facility

guidelines, their eligibility for work release, furloughs, transfer to lesser-security facilities and other privileges will be adversely affected, and they are likely to be designated as "special offenders" within the prison system with a concomitant loss of privileges. *See United States v. Fatico, supra,* 458 F. Supp. at 413, 603 F.2d at 1055-56. *See also generally Cardaropoli v. Norton,* 523 F.2d 990 (2d Cir. 1975).

Clearly, the petitioners' liberty interests under the fifth amendment have been seriously jeopardized by the procedure followed in this case. Further, there is every reason to believe that other defendants in the future will be similarly affected if district courts are permitted to adopt the procedure followed here. Cases involving challenges to the contents of presentence reports abound in the federal system,[7] and there is no reason to suggest that the conflicting approaches of the circuit courts will be resolved other than by directive of this Court.

Point II

An implicit conflict between decisions of the circuit and between circuits on the use of tape transcripts requires resolution by this Court.

By its judgment order affirming petitioners' convictions and rejecting their appeals in their entirety, the Third Circuit has implicitly created a conflict between decisions of the circuit and between circuits as to the proper use of

7. *See, e.g., United States v. Picard,* 464 F.2d 215 (1st Cir. 1972); *United States v. Rosner,* 485 F.2d 1213 (2d Cir. 1973), *cert. denied,* 417 U.S. 950 (1974); *United States v. Garcia,* 544 F.2d 681 (3d Cir. 1976); *United States v. Espinoza,* 481 F.2d 553 (5th Cir. 1973); *Collins v. Buckhoe,* 493 F.2d 343 (6th Cir. 1974); *United States v. Morgan,* 595 F.2d 1134 (9th Cir. 1979); *Smith v. United States,* 551 F.2d 1193 (10th Cir.), *cert. denied,* 434 U.S. 830 (1977).

transcripts of tape-recorded evidence. Because of the extraordinary importance of tape recordings in modern criminal trials, this issue should be resolved by this Court.

The implicit conflict between decisions of the Third Circuit arises out of two judgment orders: one affirming a district court decision which, *inter alia,* prohibited independent use by jurors of transcripts, *United States v. Johnson,* 363 F. Supp. 711, 713 (E.D. Pa. 1973), *aff'd mem.,* 492 F.2d 1239 (3d Cir. 1974); and the instant case, affirming a district court decision which, *inter alia,* permitted independent use of transcripts.

Petitioners readily concede that judgment orders, by their very nature, give no clue as to the reasoning of the panels hearing the cases or reviewing the records. They submit, simply, that an issue which has become so prominent in modern criminal trials, the proper use of tapes and tape transcripts, should not be left to judgment orders for its ultimate resolution.

Petitioners could find no case in any circuit which expressly approved the independent use of tape transcripts. Every case located on point disapproved of any use of transcripts except as a listening aid for jurors as they were actually in the process of hearing the tapes played. *E.g., United States v. Phillips,* 577 F.2d 495, 501-02 (9th Cir.), *cert. denied,* 439 U.S. 831 (1978); *United States v. Nashawaty,* 571 F.2d 71, 75 (1st Cir. 1978); *United States v. Papia,* 560 F.2d 827, 844 (7th Cir. 1977); *United States v. McMillan,* 508 F.2d 101, 105-06 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975); *Fountain v. United States,* 384 F.2d 624, 632 (5th Cir. 1967), *cert. denied sub nom. Marshall v. United States,* 390 U.S. 1005 (1968).

Here, of course, the trial court permitted the jury to use the transcripts entirely independent of the tapes them-

selves and, indeed, instructed them that they could use the transcripts "as an aid to you in deliberating." The court recognized the express concern of the petitioners that nuances of meaning that would come across in listening to the tapes, as jurors recognized inflection and tone, would be lost in the written transcripts, but permitted such independent use despite petitioners' objections.[8]

Such use is in total conflict with the limited use permitted by other circuits and in apparent conflict with another judgment order within the circuit. Because of the importance of tape-recorded evidence in today's courts, this Court should resolve this question and preclude any independent use of tape transcripts by trial juries except as an aid in listening to the recordings themselves.

Point III

The trial court's error in admitting into evidence one of three grand jury transcripts warrants review by this Court.

The trial court's error in admitting into evidence the transcript of only one of three grand jury appearances by the alleged victim of the extortion was of such magnitude as to warrant this Court's review. The importance of the federal procedural question involved cannot be overstated. If Fed. R. Evid. 106 is to have any force or meaning at all, the result here cannot be allowed to stand.

Louis Crescenzi, the supposed extortion victim, testified three times before the grand jury, once in October and twice in June. In October, he testified that he had been put

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8. The court justified independent use of the transcripts on the basis that the jurors might damage the tapes and taping equipment and it therefore would not permit the jury to have the tapes in the jury room (App. 2919-2920).

in fear by the petitioners. He recanted this inculpatory testimony in his June appearances. At trial, he testified that all three of his grand jury appearances were marked by overbearing and leading questions by the government prosecutors, and by the prosecutors' failure to allow him to respond fully to questions.

The October transcript was critical to the government's case, as it contained the only express statements by Crescenzi that the petitioners had put him in fear. His trial testimony was consistent with his June grand jury testimony in which he stated that he had not been put in fear.

The government used portions of all three transcripts as part of its case-in-chief. On cross-examination, petitioners similarly used all three transcripts and questioned Crescenzi about his contention that he had not been allowed to answer fully during any of his grand jury appearances. Thereafter, the government sought to have the physical copy of the October transcript admitted into evidence on the grounds that the jurors could review it and decide for themselves whether there had been any impropriety in the prosecutors' conduct of the grand jury proceedings. The trial court, on that basis, admitted the one transcript. Petitioners then sought to have the other two transcripts admitted under Fed. R. Evid. 106 and the doctrine of completeness embodied therein, since their cross-examination had called into question the propriety of all three grand jury appearances and not just the October appearance. The trial court, however, refused to admit the two later transcripts.[9]

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9. The court's reason for refusing to admit the June transcripts was that they contained prior consistent statements and therefore constituted hearsay (App. 2658-61). The record shows, however, that virtually every statement contained in the June transcripts was read into the record, without objection, in the form

Petitioners argued vigorously that the questioning process before the grand jury could not be evaluated properly unless the jury was given the complete grand jury transcript—October and June—as the June transcripts also disclosed numerous instances of improper and overbearing questioning by the prosecutors. The trial court, however, refused to admit the two later transcripts.

This error was of incredible proportions. Firstly, to allow the government to rebut the petitioners' attack upon the entire grand jury process by introducing only the October transcript was to effectively cut in half the picture of grand jury impropriety developed by the defense, and to submit to the jury a distorted picture of the overbearing nature of the entire grand jury proceeding. The prevention of such distorted pictures is the very purpose behind the doctrine of completeness. *See, e.g., United States v. Rubin,* 609 F.2d 51, 63 (2d Cir. 1979).

Much more importantly, however, the net effect of the trial court's ruling was to present the jury with a written capsule of the government's case-in-chief, even though the most damning testimony in the transcript had been recanted or substantially modified in the later transcripts. It is clear, under the law, that the government may not—on some other pretext—put before the jury in written form its entire case, and the error in allowing it to do so is never held harmless. *See United States v. Quinto,* 582 F.2d 224, 235-36 (2d Cir. 1978) (by admitting such a document, "[t]he government's witnesses in effect accompanied the jury into the jury room"; and under such cir-

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of a question. (*E.g.*, App. 2189-95, 2209-18, 2225-26). Such action rendered the statements "part of the evidence in the case, . . . usable to the extent of the rational persuasive power it may have." *McCormick on Evidence,* §54 (West 1954) at p. 125. Further, Fed. R. Evid. 801(d)(1)(B) is squarely applicable and should have negated any hearsay objection. Thus, there was no legal basis for excluding the transcripts.

cumstances, "we cannot say that the error did not influence the jury"); *United States v. Ware*, 247 F.2d 698, 700-01 (7th Cir. 1957).

The error here is magnified by the simple fact that adherence to the spirit and letter of Fed. R. Evid. 106 would have eliminated the entire problem: the jury would have had all the transcripts for the purpose of reviewing the propriety of the grand jury process and had the jurors gone on, as human nature indicates was likely, to review the substance of the testimony, the ends of fundamental fairness would have been served since both the inculpatory October testimony and the modifications of June would have been before the jurors together.[10]

Although the factual circumstances of this case may be somewhat unique, this problem is likely to recur in other cases. The sheer complexity of many criminal statutes, combined with practical constraints of time and scheduling, virtually guarantee that many witnesses will appear on more than one occasion before a grand jury. If the transcripts of these appearances may be treated discretely, as Crescenzi's were, and admitted piecemeal, Fed. R. Evid. 106 becomes an empty promise. The advent of the Jencks Act, 18 U.S.C. §3500, brought with it increasing defense attacks on the propriety of grand jury proceedings, and defendants ought not to be faced with the choice between the Charybdis of having only part of a witness' grand jury transcripts admitted into evidence and the Scylla of foregoing cross-examination into possible impropriety before the grand jury. The potential for recurring problems in this area justifies the issuance of the writ to review this issue.

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10. The error was further compounded when the court, in its instructions to the jury, called the jurors' attention to the distinction between Crescenzi's trial testimony and his October grand jury testimony and failed to mention Crescenzi's modification of his October statements during his June grand jury appearances (App. 2958-2959).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

MATTHEW P. BOYLAN
Counsel of Record for Petitioners

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O'Connor,
Attorneys for Petitioner,
Larry Ricci

May 23, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2385/2386, 79-2433 AND 79-2442

UNITED STATES OF AMERICA v. FIUMARA, TINO,
Appellant, No. 79-2385

UNITED STATES OF AMERICA v.
COPOLLA, MICHAEL,
Appellant, No. 79-2386

UNITED STATES OF AMERICA v. COPOLLA, JERRY,
Appellant, No. 79-2433

UNITED STATES OF AMERICA v. RICCI, LARRY,
Appellant, No. 79-2442

Appeal from the United States District Court
for the District of New Jersey

Submitted Under Third Circuit Rule 12(6)
Before: ALDISERT and GIBBONS, *Circuit Judges,* and
POLLAK, *District Judge.**

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, that (1) the district court erred in admitting into evidence the entire transcript of Crescenzi's October

* Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

grand jury testimony and refusing to admit similarly his June grand jury testimony; (2) the trial court erred in permitting the jury to use transcripts of tape recordings as substantive aids to their deliberations; (3) appellants were denied due process of law by the failure of the trial court to protect them from the effects of prejudicial pretrial publicity; (4) the trial court erred in its failure to advise jurors of the sequestration order prior to the exercise of peremptory challenges; (5) the trial court erred in its instruction to the jury that it could convict upon a finding that appellants' actions would create fear in "an ordinary person"; (6) the trial court abused its discretion by unduly limiting the contents of its supplemental instruction to the jury; (7) the trial court erred when it permitted interpretive testimony by lay witnesses of the unambiguous statements of others; (8) the trial court erred in admitting two tape recordings into evidence under Fed. R. Evid. 801(d)(2)(D); (9) the trial court erred in denying appellant Ricci's motion for judgment of acquittal; (10) appellants were deprived of due process of law by prosecutorial misconduct before the grand jury; (11) the sentencing hearing conducted by the court was improper; and (12) the appellants were deprived of a fair trial by the improper and prejudicial conduct of the trial judge in the proceedings below; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert
ALDISERT
Circuit Judge

Certified as a true copy and issued in lieu of a formal mandate on May 1, 1980.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Attest:

/s/ Thomas F. Quinn
THOMAS F. QUINN
Clerk

DATED: March 21, 1980

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-2385/2386, 79-2433 AND 79-2442

UNITED STATES OF AMERICA v. FIUMARA, TINO,
Appellant, No. 79-2385

UNITED STATES OF AMERICA v.
COPOLLA, MICHAEL,
Appellant, No. 79-2386

UNITED STATES OF AMERICA v. COPOLLA, JERRY,
Appellant, No. 79-2433

UNITED STATES OF AMERICA v. RICCI, LARRY,
Appellant, No. 79-2442

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges,* and POLLAK, *District Judge.*[*]

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the de-

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[*] Honorable Louis H. Pollak, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

cision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
ALDISERT
Judge

Dated: April 23, 1980

APPENDIX C

LETTER DATED JULY 10, 1979 TO U.S. PROBATION OFFICE FROM U.S. ATTORNEY

Joseph J. Napurano
United States Probation Office
Room 527
Post Office Box 459
Newark, New Jersey 07101

Re: Sentencing in United States v.
Tino Fiumara, Michael Copolla, Jerry Copolla, and Larry Ricci, Crim. No. 79-318

Dear Mr. Napurano:

Pursuant to Title 18, United States Code, Section 3577, the Government asks that you incorporate in your presentence report the following information concerning defendants Tino Fiumara, Michael Copolla, Jerry Copolla and Larry Ricci. If any of this information is challenged by any of the defendants the Government is prepared to present evidence in support thereof at an evidentiary hearing prior to the imposition of sentence. *See United States v. Fatico*, 458 F. Supp. 388 (E.D. N.Y. 1978) (Opinion on Remand).

TINO FIUMARA

1. On or about October 14, 1967, at the 309 Club, located at 309 Lafayette Street, Newark, New Jersey, the defendant Tino Fiumara murdered Peter Martello, also known as "Flatnose Pete," Patsy Collucci and Nicholas Collucci by shooting them to death.

2. Between on or about January 1, 1969, and March 29, 1969, at the City of Paterson, New Jersey, the defendant Tino Fiumara and others murdered Robert Harris by beating and shooting him.

3. On or about April 18, 1973, at the City of Hoboken, New Jersey, the defendant Tino Fiumara wounded William Murphy, a former President of the International Longshoreman's Association Checker's Union, by means of shooting.

4. On or about August 4, 1976, at Newark, New Jersey, the defendant Tino Fiumara assaulted an unidentified male by punching him, throwing him to the ground, and kicking him.

5. On March 8, 1961, the defendant Tino Fiumara was convicted in Essex County Court, Newark, New Jersey, following a jury trial of attrocious assault and battery on Nicholas Barritta.

6. The defendant Fiumara controls loansharking operations run by his associates operating at a club known as Company K in Hoboken, New Jersey.

7. The defendant Fiumara controls illegal gambling operations run by his associates operating at a club known as Company K in Hoboken, New Jersey.

8. Between June of 1975 and December of 1978, the defendants Tino Fiumara and Michael Copolla and others extorted in excess of $172,000 from shippers and employers doing business along the New Jersey and New York waterfronts.

9. The defendant Tino Fiumara is a "made member" of the Genovese Organized Crime Family, and controls the activities of a number of organized crime associates, including the defendants, Michael Copolla, Jerry Copolla

and Larry Ricci. The defendant Fiumara also frequently associates with other known organized crime members and associates.

10. The defendant Tino Fiumara has no known regular, legitimate employment or source of income.

11. During the course of his participation in illegal activities and in furtherance of said illegal activities, the defendant Fiumara has employed various surreptitious means to avoid detection by law enforcement, including the use of aliases, use of code language intelligible only to members of Fiumara's group, and the switching of automobiles.

MICHAEL COPOLLA

1. The defendant Michael Copolla is a long-time, trusted subordinate of defendant Tino Fiumara, a made member of the Genovese Organized Crime Family. Defendant Michael Copolla also frequently associates with other known organized crime members and associates.

2. Defendant Michael Copolla has no known regular, legitimate employment or source of income.

3. In 1971, the defendant Michael Copolla was arrested on State loansharking charges along with Nicholas Lucignano and Luke Suppa. At the time of his arrest, defendant Michael Copolla falsely gave his name as Michael Filma and falsely gave his occupation as a barber. In 1974, defendant Michael Copolla was prosecuted on the aforesaid loansharking charges under the name Michael Filma and was acquitted.

4. Defendant Michael Copolla actively participated in and supervised illegal gambling operations controlled by defendant Tino Fiumara.

5. During the course of his participation in illegal activity and to further said illegal activity, the defendant Michael Copolla employed various surreptitious means in order to avoid detection by law enforcement including the use of aliases, code language intelligible only to members of Fiumara's group, and the switching of automobiles.

JERRY COPOLLA

1. The defendant Jerry Copolla is a long-time associate of and participant in illegal activity with known organized crime figures, including Dominic DiNorscio, a/k/a "Tommy Adams"; Louie Luciano, a/k/a "Oscar"; and Anthony Caponegro, a/k/a "Tony Bananas"; all of the Bruno Organized Crime Family; and Tino Fiumara, a made member of the Genovese Organized Crime Family.

2. The defendant Jerry Copolla is presented under indictment in Essex County, New Jersey on State charges of conspiracy, possession of lottery slips, and working a lottery.

3. Defendant Jerry Copolla has no known regular, legitimate employment or source of income, and falsely listed his employment as "clerk" at the Bella Vita Ristorante during the year 1977.

4. On or about June 2, 1977, the defendant Jerry Copolla threatened to run over Louis Crescenzi if Louis Crescenzi told anyone that the defendants had demanded 25 percent of Crescenzi's business.

5. With regard to his relationship with defendant Tino Fiumara, defendant Jerry Copolla stated on June 15, 1977, that he was "with (Fiumara) before God."

6. On September 13, 1977, defendant Jerry Copolla described the defendant Tino Fiumara as an up and coming man, and said that he, Jerry Copolla, used to tell them what to do and now "they tell him what to do."

LARRY RICCI

1. The defendant Larry Ricci is a trusted subordinate of defendant Tino Fiumara, a made member of the Genovese Organized Crime Family.

2. On July 28, 1977, the defendant Larry Ricci stated that he makes $45,000 a year at his ILA job, and the only reason he has to do anything is when the defendant Fiumara wants him to do something.

3. In conversation with other defendants, defendant Ricci used code language unintelligible to anyone other than members of Fiumara's group.

4. Defendant Larry Ricci acted as a front man on various criminal enterprises of defendant Fiumara, namely, (1) acting as President of Airport Landfill, Inc., which corporation was used to defraud the Passaic Valley Sewerage Authority; (2) acting as Fiumara's representative in an attempt to defraud the Newark Housing Authority and the United States Department of Housing and Urban Development; and (3) acting as Fiumara's representative in an attempt to extort the owner of a garbage route into selling the route to Fiumara's representatives at a price dictated by Fiumara.

Respectfully submitted,

ROBERT J. DEL TUFO,
United States Attorney
/s/ Mark J. Malone
By: MARK J. MALONE,
Assistant U.S. Attorney
/s/ Carl L. Lo Presti
CARL L. LO PRESTI,
Special Attorney

cc: Honorable Herbert J. Stern, U.S.D.J.
Dennis McAlevy, Esq. CM/RRR #623364
Martin Goldman, Esq. CM/RRR #624365
Thomas Cammarata, Esq. CM/RRR #624366
Samuel DeLuca, Esq. CM/RRR #624367

APPENDIX D

18 U.S.C. §3575, *et seq.*

§3575. Increased sentence for dangerous special offenders

(a) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony committed when the defendant was over the age of twenty-one years has reason to believe that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendere, may sign and file with the court, and may amend, a notice (1) specifying that the defendant is a dangerous special offender who upon conviction for such felony is subject to the imposition of a sentence under subsection (b) of this section, and (2) setting out with particularity the reasons why such attorney believes the defendant to be a dangerous special offender. In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendere or verdict or finding of guilty to the presiding judge without the consent of the parties. If the court finds that the filing of the notice as a public record may prejudice fair consideration of a pending criminal matter, it may order the notice sealed and the notice shall not be subject to subpena or public inspection during the pendency of such criminal matter, except on order of the court, but shall be subject to inspection by the defendant alleged to be a dangerous special offender and his counsel.

(b) Upon any plea of guilty or nolo contendere or verdict or finding of guilty of the defendant of such felony, a hearing shall be held, before sentence is imposed, by the

court sitting without a jury. The court shall fix a time for the hearing, and notice thereof shall be given to the defendant and the United States at least ten days prior thereto. The court shall permit the United States and counsel for the defendant, or the defendant if he is not represented by counsel, to inspect the presentence report sufficiently prior to the hearing as to afford a reasonable opportunity for verification. In extraordinary cases, the court may withhold material not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, any source of information obtained on a promise of confidentiality, and material previously disclosed in open court. A court withholding all or part of a presentence report shall inform the parties of its action and place in the record the reasons therefor. The court may require parties inspecting all or part of a presentence report to give notice of any part thereof intended to be controverted. In connection with the hearing, the defendant and the United States shall be entitled to assistance of counsel, compulsory process, and cross-examination of such witnesses as appear at the hearing. A duly authenticated copy of a former judgment or commitment shall be prima facie evidence of such former judgment or commitment. If it appears by a preponderance of the information, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony. The court shall place in the record its findings, including an identification

of the information relied upon in making such findings, and its reasons for the sentence imposed.

(c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.

(d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(e) A defendant is a special offender for purposes of this section if—

(1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his commission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof; or

(2) the defendant committed such felony as part of a pattern of conduct which was criminal under applicable laws of any jurisdiction, which constituted a substantial source of his income, and in which he manifested special skill or expertise; or

(3) such felony was, or the defendant committed such felony in furtherance of, a conspiracy with three or more persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the defendant did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

A conviction shown on direct or collateral review or at the hearing to be invalid or for which the defendant has been pardoned on the ground of innocence shall be disregarded for purposes of paragraph (1) of this subsection. In support of findings under paragragh (2) of this subsection, it may be shown that the defendant has had in his own name or under his control income or property not explained as derived from a source other than such conduct. For purposes of paragraph (2) of this subsection, a substantial source of income means a source of income which for any period of one year or more exceeds the minimum wage, determined on the basis of a forty-four week and a fifty-week year, without reference to exceptions, under section 6(a) (1) of the Fair Labor Standards Act of 1938 (52 Stat. 1602, as amended 80 Stat. 838), and as hereafter amended, for an employee engaged in commerce or in the production of goods for commerce, and which for the same period exceeds fifty percent of the defendant's declared adjusted gross income under section 62 of the Internal Revenue Act of 1954 (68A Stat. 17, as amended 83 Stat. 655), and as hereafter amended. For purposes of paragraph (2) of this

subsection, special skill or expertise in criminal conduct includes unusual knowledge, judgment or ability, including manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct. For purposes of paragraphs (2) and (3) of this subsection, criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

(f) A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant.

(g) The time for taking an appeal from a conviction for which sentence is imposed after proceedings under this section shall be measured from imposition of the original sentence.

Added Pub.L. 91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 948.

§3576. Review of sentence

With respect to the imposition, correction, or reduction of a sentence after proceedings under section 3575 of this chapter, a review of the sentence on the record of the sentencing court may be taken by the defendant or the United States to a court of appeals. Any review of the sentence taken by the United States shall be taken at least five days before expiration of the time for taking a review

of the sentence or appeal of the conviction by the defendant and shall be diligently prosecuted. The sentencing court may, with or without motion and notice, extend the time for taking a review of the sentence for a period not to exceed thirty days from the expiration of the time otherwise prescribed by law. The court shall not extend the time for taking a review of the sentence by the United States after the time has expired. A court extending the time for taking a review of the sentence by the United States shall extend the time for taking a review of the sentence or appeal of the conviction by the defendant for the same period. The taking of a review of the sentence by the United States shall be deemed the taking of a review of the sentence and an appeal of the conviction by the defendant. Review of the sentence shall include review of whether the procedure employed was lawful, the findings made were clearly erroneous, or the sentencing court's discretion was abused. The court of appeals on review of the sentence may, after considering the record, including the entire presentence report, information submitted during the trial of such felony and the sentencing hearing, and the findings and reasons of the sentencing court, affirm the sentence, impose or direct the imposition of any sentence which the sentencing court could originally have imposed, or remand for further sentencing proceedings and imposition of sentence, except that a sentence may be made more severe only on review of the sentence taken by the United States and after hearing. Failure of the United States to take a review of the imposition of the sentence shall, upon review taken by the United States of the correction or reduction of the sentence, foreclose imposition of a sentence more severe than that previously imposed. Any withdrawal or dismissal of review of the sentence taken by the United States shall foreclose imposition of a sentence more severe than that

reviewed but shall not otherwise foreclose the review of the sentence of the appeal of the conviction. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence. Any review of the sentence taken by the United States may be dismissed on a showing of abuse of the right of the United States to take such review.

Added Pub.L. 91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 950.

§3577. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Added Pub.L. 91-452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 951.

§3578. Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination

to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

Added Pub. L. 91—452, Title X, §1001(a), Oct. 15, 1970, 84 Stat. 951.

Supreme Court, U. S.
FILED
AUG 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1864

In the Supreme Court of the United States

OCTOBER TERM, 1979

TINO FIUMARA, MICHAEL COPOLLA, JERRY COPOLLA AND LARRY RICCI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1864

TINO FIUMARA, MICHAEL COPOLLA, JERRY COPOLLA AND LARRY RICCI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in imposing sentence, the district court properly considered hearsay evidence of petitioners' involvement in organized crime and properly declined to make factual findings regarding certain evidence presented at the sentencing hearing.

2. Whether the district court properly permitted the jury to use transcripts of tape recordings during their deliberations.

3. Whether a transcript of a government witness's grand jury testimony should have been admitted into evidence.

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OPINION BELOW

The judgment of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1980. A petition for rehearing (Pet. App. B) was denied on April 23, 1980, and the petition for a writ of certiorari was filed on May 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of extortion (Count 1) and conspiracy to commit extortion (Count II), in violation of 18 U.S.C. 1951 and 2. Petitioner Fiumara was sentenced to 20 years' imprisonment and a $10,000 fine on each count, petitioner Michael Copolla to 10 years' imprisonment and a $5,000 fine on each count, petitioner Jerry Copolla to seven years' imprisonment and a $5,000 fine on each count, and petitioner Ricci to three years' imprisonment and a $5,000 fine on each count. All prison sentences are to run concurrently. The court of appeals affirmed by judgment order (Pet. App. A).

1. The evidence showed that on May 25, 1977, petitioner Fiumara told Louis Crescenzi, a New Jersey restaurant owner, that at his request they had successfully resolved a dispute that he had with persons, including Michael Simonini, an ex-employee, who were trying to collect $4,600 allegedly owed by Crescenzi to Simonini (Tr. 1708, 1712-1715). Concerned about possible harm to himself or to his business if he did not pay for this assistance, Crescenzi asked petitioner Fiumara what he could do to repay them. Fiumara directed Crescenzi to

follow petitioner Jerry Copolla's instructions (Tr. 840-841, 1721-1722, 1726-1728).

On June 2, Jerry Copolla demanded that Crescenzi turn over 25% of the restaurant's income and told Crescenzi not to tell anyone about it, or else Copolla would have to "run you over" (Tr. 1729-1733, 1744). Two weeks later Jerry Copolla instructed Crescenzi to put him (Copolla) on the restaurant's payroll at a salary of $300 per week (Tr. 756-761, 1844). Crescenzi thereafter paid Jerry Copolla in cash every week in July, August and September and in the first week of October (Tr. 1347-1348, 1789-1793).

On October 7, 1977, while still paying petitioners on their demand (Tr. 2196), Crescenzi testified before the grand jury. He described how he had sought petitioners' assistance to settle the claim and how he subsequently had paid them part of his profits out of fear that petitioners would harm him if he refused to cooperate.

In his trial testimony, Crescenzi changed the story he had given the grand jury in October 1977 and testified that he was never threatened by petitioners, but rather paid them voluntarily. On occasions where Crescenzi's trial testimony differed from his October grand jury testimony, the government utilized the grand jury testimony to question Crescenzi about the inconsistencies (see, *e.g.*, Tr. 1721-1722, 1735-1737).

At the conclusion of the direct examination, the government offered the October 7 testimony into evidence, contending that, as a statement under oath inconsistent with his trial testimony, it was not hearsay under Fed. R. Evid. 801(d)(1)(A) and was therefore admissible. The district court reserved its ruling until after cross examination (Tr. 1902-1903).

Crescenzi then related on cross examination that on June 1 and June 29, 1978, he had appeared before the grand jury and had attempted to "correct" his earlier testimony by giving essentially the same testimony as he later gave at trial. In an attempt to explain why he had earlier testified differently, Crescenzi said that he was not given a chance to explain his answers and that the prosecutor's questioning during his October testimony was deceiving and suggestive (see, *e.g.*, Tr. 1965-1966, 1989, 1991-1992, 2063-2065).

After recross examination, the court accepted the government's additional argument that the October grand jury transcript was admissible as evidence to rebut the assertion that Crescenzi had been tricked and misled before the grand jury (see Tr. 2027-2028, 2227-2230). The court also determined that a transcript of the October grand jury appearance should be given to the jury instead of merely having particular questions read to them, because the court found that the jury could decide if Crescenzi had been unfairly interrupted by the prosecutor during his grand jury testimony only by examining the transcript itself (Tr. 2659-2660).

2. The court also permitted the government to introduce tape recordings of conversations between Crescenzi and an informant, Patrick Kelly, as additional evidence to show that Crescenzi paid petitioners because of fear. The jury was given a transcript of the tape recordings. Before permitting the jury to listen to the tapes, the court admonished the jury how it could use transcripts of the tape recordings that had been prepared (Tr. 379-380):

> [Transcript G-1A] is actually only what somebody else heard, who put on these earphones as you will very shortly. That person listened through the

> earphones and wrote down what they heard through their ears. And prepared this transcript. I am giving it to you only as an aid to you. It is not the primary evidence of what was actually said. The primary evidence of what was actually said during the conversation will be what is on the tape, itself. * * * If at any time in listening to the tapes, you through your earphones, hear something different than is written on the paper, then I instruct you to disregard what is on the paper and follow what you, yourself hear * * * with your own ears * * *.

Before and after summation, petitioners objected to sending transcripts of the tape recordings into the jury room without the accompanying tapes. The court nonetheless decided to send the transcripts in as an aid to the jury in their determination whether any of the tape recorded conversations corroborated the conflicting trial testimony of Crescenzi and the informant (Tr. 2916, 2945-2946). In its final instructions, the court charged the jury on the use of the transcripts as follows (Tr. 2946-2947):

> I want you to remember the instruction I gave you at the time you first heard those recordings and first read from the transcripts. The primary evidence of what the recordings actually are are the recordings themselves. * * *
>
> * * * * *
>
> If the jury wishes I will, of course, have played for you any tape recording which is in evidence which you wish to hear. So, in other words, you may use the transcripts as an aid to you in deliberating, and if you require it, or wish it, I will have replayed for you any of the conversations. I cannot send the tape recordings, themselves, into the jury room for the excellent reason that I doubt many of you know how

> to work all the equipment that would be required and, second of all, as you know, there are some irrelevant conversations which have to be deleted and they remain on the tape and couldn't be deleted by you in the jury room.

3. Prior to sentencing, by a letter dated July 10, 1979 (Pet. App. C), the government advised the Probation Office of evidence of other criminal conduct on the part of petitioners and requested that the Probation Office incorporate the evidence in its presentence reports. The government asserted, *inter alia*, that petitioners were members of organized crime and had no legitimate means of support and that petitioner Fiumara had committed two murders for which he was neither tried nor indicted. Petitioners challenged the accuracy of the charges and were granted an evidentiary hearing.

At the hearing, petitioners (with the exception of petitioner Ricci) called no witnesses and presented no affirmative evidence to disprove the government's allegations. The court, when it subsequently imposed sentence, made no specific findings as to whether the government had proven every allegation of additional criminal conduct. Instead, the court stated (App. 4834a-4838a):[1]

> Everything the Court learned about these defendants [at trial], with perhaps one exception, was confirmed by the sentencing hearing. Not one piece of mitigating circumstances was presented. * * * Everything this Court heard served only to confirm its assessment made at the trial itself, that

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[1] "App." refers to the transcript of the sentencing hearing, as paginated in petitioners' joint appendix filed in the court of appeals.

the defendants before it were engaged in organized criminal activity. * * *

I say again the issue before me is not whether a defendant committed this or that specific wrong in the past. He is not being punished for a specific wrong in the past, he is being punished for the crime this jury found him guilty of. But the Court has the duty, the obligation, unavoidable, in considering the background and the potentiality of each defendant and in that regard held a hearing * * *.

* * * * *

This court finds now, and finds as a result of the trial, and has heard nothing to change its opinion, that the defendant Fiumara, the defendant Michael Copolla, and the defendant Jerry Copolla, traded on and used the defendant Fiumara's reputation in the community for violence, for fear, for wrongdoing in general, as a tool or a weapon against Louis Crescenzi.[2]

Petitioners at no time made any request to the district court that it make specific findings with reference to the sentencing hearing.

ARGUMENT

1. Petitioners argue (Pet. 8-16) that the district court deprived them of due process in connection with their sentencing by considering evidence of criminal charges not embodied in an official record of conviction and by failing to make specific findings of fact as to the

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[2]The court did note that the sentencing hearing had altered its view of petitioner Ricci and that this would have an impact on the sentencing decision (App. 4838a). As noted above, Ricci received a sentence of only three years' imprisonment.

government's charges of additional criminal conduct presented at the sentencing hearing. Both contentions are without merit.

It is well settled that the Due Process Clause does not prohibit the use of hearsay evidence at a sentencing proceeding or require that the convicted defendant be allowed to cross examine the source of such information. "[O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause * * * consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959). See also *Williams* v. *New York*, 337 U.S. 241, 247 (1949); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *Roberts* v. *United States*, No. 78-1793 (April 15, 1980). Thus, "before making [the sentencing] determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, *supra*, 404 U.S. at 446, quoted in *United States* v. *Grayson*, *supra*, 438 U.S. at 50.

The factors that the sentencing court may consider include information that the defendant has committed unrelated crimes for which he has not been convicted. See, *e.g.*, *Williams* v. *New York*, *supra*, 337 U.S. at 244 (consideration of information that defendant had committed 30 burglaries for which he had not been convicted and that he was a "menace to society"). Petitioners contend (Pet. 11 n.4) that the Court's holding in *Williams*

v. *New York, supra,* has been limited by later decisions. However, the Court's opinion in *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967), and the plurality opinion in *Gardner* v. *Florida*, 430 U.S. 349, 355-357 (1977), relied upon by petitioner for this proposition, expressly adhere to the holding in *Williams*, and the plurality opinion in *Lockett* v. *Ohio*, 438 U.S. 586, 602-603 (1978), cites *Williams* with approval. Indeed, this aspect of *Williams* was reaffirmed by the Court in *United States* v. *Grayson*, *supra*, 438 U.S. at 53-54. See also *Roberts* v. *United States*, *supra*, slip op. 4.[3]

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[3]Petitioners rely in their due process argument (Pet. 8-9) on *Baker* v. *United States*, 388 F. 2d 931, 934 (4th Cir. 1968), where the court stated that "[n]o conviction or criminal charge should be included in the [presentence] report, or considered by the court, unless referable to an official record." Petitioner's reliance on this statement in *Baker* is misplaced for a variety of reasons. First, the court was only referring to convictions or formal criminal charges, not all statements regarding past conduct that may be criminal. See 388 F. 2d at 932 (quoting district court's reference to "serious charges" against defendant that were withdrawn because his father had interceded on his behalf); see also *id.* at 933. Compare *United States* v. *Sheppard*, 462 F. 2d 279, 280 (D.C. Cir. 1972), cited in *United States* v. *Strother*, 578 F. 2d 397, 406 n.8 (D.C. Cir. 1978), discussed *infra*. Thus, immediately after the statement quoted by petitioners, the court stated that "the defendant's general conduct and behavior" may be treated in the report, and the court did not indicate that references to conduct or behavior must be omitted where it may be criminal. Second, the Fourth Circuit did not suggest, as petitioners do here, that the requirement that criminal charges be referable to a public record was compelled as a matter of due process. Third, any intimations that evidence of other criminal activity could not be considered unless evidenced by a conviction or formal charge would be inconsistent with *Williams* v. *New York*, *supra*, as reaffirmed (subsequent to the decision in *Baker*) in *United States* v. *Grayson*, *supra*. Finally, the Fourth Circuit's decision in *Baker* preceded enactment in 1970 of 18 U.S.C. 3577, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of the defendant that may be considered for purposes of sentencing. See also *United States* v.

Furthermore, petitioners' claim that due process requires the sentencing judge to make detailed findings of fact as to each incident mentioned in the report, which findings can then be appealed, is insubstantial. It is undisputed, of course, that due process prohibits sentencing courts from considering materially false information. See, *e.g.*, *United States* v. *Tucker*, *supra*, 404 U.S. at 443; *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948). In addition, some courts of appeals have instructed sentencing courts to require verification of challenged evidence through cross examination and corroboration. See *United States* v. *Weston*, 448 F. 2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *United States* v. *Bass*, 535 F. 2d 110, 118 (D.C. Cir. 1976); *United States* v. *Needles*, 472 F. 2d 652 (2d Cir. 1973). Yet the Due Process Clause is not "treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." *Williams* v. *New York*, *supra*, 337 U.S. at 251. Accordingly, as the district

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Tucker, *supra*; *United States* v. *Lee*, 540 F. 2d 1205, 1210-1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).

The Ninth Circuit's decision in *United States* v. *Weston*, 448 F. 2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), upon which petitioners also rely, expressly declined to follow what the court apparently believed to be the holding in *Baker* that no other criminal activity could be considered (*id.* at 633 n.1). In *United States* v. *Strother*, *supra*, also relied upon by petitioners, the court did not hold that information about criminal activity could not be included in a presentence report. It stated only that a provision in the ABA Standards for Criminal Justice Relating to Probation, which suggests that a description of the offender's prior criminal record be limited to charges that have resulted in conviction, "merits careful consideration by the Probation Office and the U.S. Attorney" (578 F. 2d at 406 n.8).

court noted (App. 4826a), the purpose of a sentencing hearing is "* * * to give fair hearing to both sides and not to convert such a hearing into a post-trial trial in which the judge was obligated to make findings of fact under any standard of proof certain."[4]

In this case, the sentencing judge afforded petitioners the opportunity, in a hearing filling more than 1,600 pages of transcript, to contest allegations in the presentence report. Indeed, in response to petitioners' challenge, the government withdrew certain of its contentions (see App. 4828a). The court declined to make a determination as to whether the criminal activity mentioned in the presentence report was in fact committed (see App. 4829a-4831a), and petitioners never requested the court to make such findings.[5] Instead, the court utilitized evidence presented at the hearing as information to be considered in determining whether petitioners were dangerous to the community and whether their usual employment was criminal or legitimate. As to these matters, the court did make findings (App. 4832a-4833a, 4837a-4838a; see pages 5-6, *supra*). Moreover, in finding that petitioners were members of organized criminal groups and that petitioners Michael Copolla, Jerry Copolla, and Fiumara

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[4]The district court in *United States* v. *Fatico*, 458 F. Supp. 388 (E.D.N.Y. 1978), required the government to prove its charges that the defendant was a member of an organized crime "family" by "clear, unequivocal and convincing evidence." The Second Circuit, however, did not reach the question of the proper standard of proof, except to hold that proof beyond a reasonable doubt was not necessary. *United States* v. *Fatico*, 603 F. 2d 1053, 1057 n.9 (2d Cir.), cert. denied, 440 U.S. 910 (1979). No conflict with the Second Circuit's decision is therefore presented.

[5]Indeed, petitioner Fiumara requested that the court refrain from disclosing in open court the basis for the sentence imposed to the extent it was predicated upon allegations of criminal activity not established by record of conviction (App. 4989a-4993a).

had no legitimate means of support, the court based its conclusion principally on the evidence presented during the trial. The district court utilized the government's presentations at the sentencing hearing as confirmation of what it learned at trial (see App. 4823a-4835a, 4837a-4838a).[6] In view of the court's finding that the sentencing hearing merely reinforced impressions gleaned from the trial (and developed no mitigating considerations (App. 4834a-4835a)) and that the court did not rely upon the veracity of the government's charges of other crimes, review by this Court is unwarranted.[7]

2. Petitioners next argue (Pet. 16-18) that the court committed reversible error when it permitted the jury to take transcripts of tape recorded evidence into the jury room without the accompanying tape recordings. Petitioners do not point to any inaccuracy in the transcripts that would suggest they were an unreliable aid in the jury's deliberations. In any event, under the

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[6]The court did find that its prehearing assumption that petitioner Ricci had no legitimate means of support was altered by evidence presented at the sentencing hearing (App. 4838a).

[7]Petitioners' reliance on *Specht* v. *Patterson*, 386 U.S. 605 (1967), and the Dangerous Special Offenders Act, 18 U.S.C. 3575, *et seq.*, is misplaced. In *Specht*, the defendant was convicted of the crime of indecent liberties, which served as the predicate for a separate commitment proceeding and sentence under the Sex Offenders Act. The Court expressly adhered to its decision in *Williams*, but declined to extend the *Williams* rule to a case where "[t]he Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act." 386 U.S. at 608. Similarly, the Dangerous Special Offenders statute makes past convictions the basis for enhanced sentencing under the Act. Since the present case involved sentencing only within statutory limits for the crimes for which petitioners were convicted at trial, *Specht* and the procedures employed in the Dangerous Special Offenders Act are of no relevance.

circumstances of this case, the district court did not err in allowing the jury to have the transcripts.

Admission of sound recordings and transcripts thereof is entirely within the discretion of the trial judge. See, *e.g.*, *United States* v. *Turner*, 528 F. 2d 143, 148, 167 (9th Cir.), cert. denied, 423 U.S. 996 (1975). Although, as petitioners assert, submission of a transcript alone to the jury during deliberations is usually discouraged because the tape recording itself is the best evidence of the prior conversation,[8] courts have permitted juries to have transcripts during deliberations where the jury has already heard the tape, the tape is long and cumbersome, and the jury was given limiting instructions on the proper use of the transcripts. See *United States* v. *Lam Lek Chong*, 544 F. 2d 58, 71 (2d Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Koska*, 443 F. 2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

In the instant case, the trial court instructed the jury that the tapes were the primary evidence of what was said, that the transcripts were only to be used as an aid in deliberating, and that the jury could have replayed any tape they wished to hear (see page 4, *supra*).[9] The court found that it was not feasible to send the tapes in with the jury because the tapes were not edited of prejudicial material and that the transcripts themselves, which had been personally reviewed by the court and were extensively relied upon by both government and defense counsel, were extremely accurate (Tr. 2917-2919).[10] In

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[8]See, *e.g.*, *United States* v. *McMillan*, 508 F. 2d 101, 105-106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *Rotchford*, 575 F. 2d 166, 172 (8th Cir. 1978).

[9]The court did in fact comply with a jury request that the court replay one tape during the course of deliberations (Tr. 2976-3000).

[10]The court also found that the machinery to play the tapes would have been cumbersome for the jury to operate.

these circumstances, the court did not abuse its discretion in permitting the jury to retain copies of the transcripts.

3. Petitioners finally contend (Pet. 18-21) that the court erred in refusing to permit the jury to have transcripts of Crescenzi's testimony before the grand jury on June 1 and June 29, 1978. Petitioners concede (Pet. 19-20 n.9) that virtually every pertinent statement made by Crescenzi during his June appearances before the grand jury was read into the record by counsel in the course of the trial. But they argue that the district court also should have permitted the jury to receive actual transcripts of the June appearances because the court had permitted the jury to receive copies of the transcript of Crescenzi's October grand jury appearance. Petitioners' argument is without merit.

At trial, Crescenzi testified that petitioners had not put him in fear of harm to himself, members of his family, or his business and that he had paid petitioners voluntarily (Pet. 4; see, *e.g.*, Tr. 1735, 2008). The court then permitted the prosecutor to read portions of the transcript of Crescenzi's appearance before the grand jury in October 1977, during which he testified that he was placed in fear by petitioners (see, *e.g.*, Tr. 1721-1722, 1735-1737). This ruling, which petitioners do not challenge, was plainly correct. The grand jury testimony constituted prior inconsistent sworn statements of the witness and therefore, by virtue of Fed. R. Evid. 801(d)(1)(A), was not hearsay. But the district court did not admit the entire transcript into evidence and permit the jury to examine it on this basis. The district court admitted the transcript because petitioners sought to establish that Crescenzi's examination before the grand jury in October had been unfair due to overreaching, improper questioning, and manipulation by the government. Only by reading the entire transcript, the court reasoned, could the jury

determine whether in fact there had been misconduct on the part of the government that caused Crescenzi to testify in a manner inconsistent with his subsequent trial testimony (Tr. 2659-2660).

The district court correctly determined (Tr. 2060-2662) that Crescenzi's testimony before the grand jury in June, at issue here, was inadmissible hearsay because it was consistent with his trial testimony that he had not been in fear of petitioners and that his contrary testimony before the grand jury in October was the product of overreaching by the government.[11] However, petitioners argued in district court (Tr. 2657), and argue in this Court (Pet. 18-21), that Crescenzi's testimony was admissible under Fed. R. Evid. 106.[12]

When a writing or recorded statement is introduced into evidence by a party, Rule 106 allows an adverse party to require that the remainder of the writing or statement or related writings or statements be introduced into evidence if such matter ought in fairness be considered

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[11]Petitioners assert that the June testimony, even though consistent with Crescenzi's trial testimony, was admissible under Fed. R. Evid. 801(d)(1)(B) to rebut charges of recent fabrication. Petitioners did not rely on Fed. R. Evid. 801(d)(1)(B) in arguing the admissibility of the transcript in district court (Tr. 2655-2666). In any event, the prior consistent statement must predate the inception of the motive to fabricate to be admissible under Rule 801(d)(1)(B). *United States* v. *Quinto*, 582 F. 2d 224, 232-235 (2d Cir. 1978). Here, the motivation for Crescenzi to fabricate his testimony at trial—*i.e.*, fear of petitioners—was the same as would have obtained at the time of his grand jury appearance in June 1978, and therefore his testimony on that occasion did not predate the motive to fabricate.

[12]Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

contemporaneously with it. The rule is designed to avoid misleading impressions caused by taking matters out of context. See Advisory Committee Notes to Rule 106; *United States* v. *Jamar*, 561 F. 2d 1103 (4th Cir. 1977). There can be no contention in the present case that Crescenzi's October grand jury testimony might have been considered out of context, because the entire testimony was available to the jury in the form of the transcript. Rule 106 did not, in our view, require admission of Crescenzi's June testimony, given some eight months later, in order to present the full context of his October appearance.

Moreover, as noted above, the pertinent portions of Crescenzi's June testimony *were* read into the record during cross examination, despite the fact that they were inadmissible hearsay. Thus, even if Rule 106 applied with respect to the June testimony, it was satisfied here. The district court went further with respect to the October testimony, by allowing the jury to receive a copy of the transcript, only because of petitioners' allegations of pervasive prosecutorial misconduct at Crescenzi's October appearance. Petitioners did not mount a comparable attack on the manner in which the June proceedings were conducted—and for good reason, because Crescenzi's testimony on those occasions, like his testimony at trial, tended to exculpate petitioners. Thus, as the district court held, there was no need for the jury to receive the actual transcripts of the June proceedings in order to determine whether Crescenzi had been the victim of prosecutorial misconduct.[13]

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[13]In the court of appeals, petitioners cited but one instance (Reply Br. 9-11) in which the attorney for the government supposedly cut Crescenzi off during questioning at an appearance in June (Tr. 2209-2210). But, on that occasion, the attorney for the government interrupted Crescenzi only to request him to listen to the question. The attorney for the government then told Crescenzi he could explain

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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his view, and, in fact, he fully did so with respect to payments made to petitioners (App. 4927a-4932a). Crescenzi testified at trial that he could not remember the incident or whether he was stopped in the course of the testimony (Tr. 2216-2218). In any event, Crescenzi was fully cross-examined as to whether he was cut off by the government attorney at this point (Tr. 2210, 2216, 2218). Petitioners can hardly assert that they were prejudiced because the jury did not have the entire transcript of the June proceedings so it could examine this one passage, which, at all events, was fully explored at trial. The other passage relied upon by petitioners in the court of appeals (Reply Br. 12-13; Tr. 1965-1966) quite clearly refers to Crescenzi's October, not his June, appearance.

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